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ANALYSIS OF DISPUTES RELATIVE TO
GOVERNMENT FURNISHED PROPERTY

by

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June 1990

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Analysis of Disputes Relative to
Government Furnished Property

by

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requirements for the degree of

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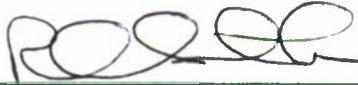
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ABSTRACT

The purpose of this thesis is to identify problems in the management of Government Furnished Property (GFP) in the Government's acquisition process. The research focused on the reasons the Armed Services Board of Appeals (ASBCA) sustained the contractor's appeal of the contracting officer's final decision (COFD). Using this research methodology it was found that the rationale used by the ASBCA in sustaining the contractor's appeal could be used to categorize the problems in the management of GFP as follows: (1) GFP not suitable for its intended use, (2) Government failure to deliver GFP, (3) Government failure to compensate for additional costs associated with additional items of GFE, (4) equipment should have been GFE vice CFE, and (5) Government failure to maintain accurate records of what it furnished as GFP. Reasons one and two are related to the Government's requirements under the GFP clause and account for 72.7% of the ASBCA's reasons for sustaining the appeals of this study. The study also showed that case law is the most highly relied upon basis to support the ASBCA's decision, followed by the GFP clause.

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I. INTRODUCTION

A. BACKGROUND

There are about 1000 Armed Services Board of Appeals (ASBCA) decisions that reference Government furnished property (GFP) on file at Federal Legal Information Through Electronics (FLITE). The FLITE data base has accumulated these decisions from 1956 to the present. These decisions have resulted from contractors appealing the contracting officer's final determination on matters arising from issues related to Government furnished property.

When the Government furnishes property to the contractor under a competitively awarded firm fixed-price type contract, the contractor assumes the risk and is responsible for loss or damage, except for reasonable wear and tear, and normal consumption during the performance of a contract. Under other contract types the Government assumes the risk as a self-insurer. Problems have arisen when the contractor has claimed that the Government didn't live up to its responsibilities. For example, the contractor has made claims that the Government didn't furnish the property on time causing a delay in the performance of the contract. Another example is a contractor claim that the Government didn't provide material suitable for its intended use. Problems from the other point of view have occurred when the Government has claimed that the

contractor has failed to properly protect the Government's property and, in some cases, used the property for work on other contracts.

B. OBJECTIVES AND RESEARCH QUESTIONS

The primary objective of this study is to point out the implications of ASBCA decisions which contracting officers should consider when dealing with issues regarding Government furnished property. The secondary objective of this study is to propose solutions to alleviate any problems that may be found in order to reduce the Government's risk associated with Government furnished property.

The primary research question and subsidiary questions are as follows.

1. Primary Research Question

- What implications can be drawn from ASBCA decisions to improve the management of Government property in the possession of a contractor?

2. Subsidiary Research Questions

- What are the principal areas of disputes relative to Government furnished property?
- What are the key characteristics of disputes arising from contractor management and use of Government furnished property?
- What are the essential differences between ASBCA decisions and the Federal Acquisition Regulation and how do these differences arise?
- How might these differences be resolved?
- What are the principal areas that the Government is at risk from not considering ASBCA decisions or the Federal

Acquisition Regulation relative to Government furnished property?

C. STUDY LIMITATIONS

The following criteria will limit the study to the appropriate cases:

- DoD cases.
- ASBCA decisions.
- Cases completely or partially sustained in favor of the contractor.
- Cases where problems with GFP are at issue.
- Cases occurring from 1986 to the present.

The above criteria will ensure that the lessons learned from the case analyses are relevant to assisting present DoD contracting officers in making appropriate decisions on issues related to Government furnished property. The cases sustained in favor of the contractor will include partially sustained decisions when the sustained portion involves GFP.

Another part of this research will be to develop two tables showing a summary of contract characteristics of GFP-sustained appeals and the reasons the ASBCA sustained the GFP-related appeal. These tables will show any trends that may have developed through ASBCA decisions.

D. LITERATURE REVIEW

The literature review included the Naval Postgraduate School's (NPS) theses and acquisition libraries. FLITE and

Defense Logistics Studies Information Exchange (DLSIE) computerized data bases were also utilized.

The most successful source was FLITE. FLITE not only provided tailored listings and case excerpts, but also provided full case texts which were the main source data for analysis. The research attorney was very helpful in suggesting ways to tailor the search to provide cases pertinent to this study.

No other thesis was found that researched contract disputes involving GFP. Two NPS theses were useful in structuring this research. The first thesis was Armed Services Board of Contract Appeals: Analysis of Sustained Decisions on DoD Supply Contract Disputes by Robert Douglas Parsons [Ref. 1] and the second was A Case Analysis of DoD Sustained Termination for Default Decisions from the Armed Services Board of Contract Appeals by Jeffrey L. Ford [Ref. 2].

E. ORGANIZATION

Chapter II, "Background," provides general information on GFP required to understand why it exists and where contract disputes could occur. The last section explains current dispute procedures required by enactment of the Contract Disputes Act of 1978 and how contract disputes are litigated in the ASBCA as one of the possible venues.

Chapter III, "Case Synopsis," summarizes 11 individual case texts selected for this study. The cases were selected

by using FLITE search criteria that included four of the five elements listed in the Study Limitations section of this chapter. Element three, cases completely or partially sustained in favor of the contractor, was not included as part of the search criteria. The case texts from this search were reviewed, eliminating those that were ruled in favor of the Government. Cases were also eliminated when GFP was cited in the text, but the dispute didn't actually involve GFP. Sufficient detail will be provided to show what actions led to the appeal and what evidence the Board reviewed in making its decision.

Chapter IV, "Case Analysis," analyzes the reasoning for the Board's decision sustaining the appeal. The analysis will also try to determine what the contracting officer's reasoning was in making his final decision, which was the decision that was appealed by the contractor. Lastly, the analysis will discuss what actions the contracting officer or other Government personnel should have taken. The last section of this chapter will present and analyze two tables. The first is a summary of GFP-sustained appeals and contract characteristics. The second table is a comparison of the reasons the Board sustained the GFP-related appeals.

Chapter V, "Conclusions and Recommendations," will provide solutions to the research questions to improve the effectiveness of decisions made by contracting officers in regards to the management of GFP.

II. FRAMEWORK

A. GENERAL INFORMATION

Government property is all property owned by or leased to the Government or acquired by the Government under the terms of a contract. Government furnished property is property in the possession of, or directly acquired by, the Government and subsequently made available to a contractor [Ref. 3].

The basic Government policy is that the contractor is expected to furnish all assets required for performance of the contract. In many Government acquisitions there is a requirement for the Government to furnish the contractor some type of material. When this happens the Government should first make every possible effort to furnish, or offer, existing assets that are suitable for the work to be accomplished. If existing assets are not available, are not suitable, or cannot be provided in a timely manner, the Government is authorized to purchase or fabricate the required property [Ref. 4:p. 4-30].

The contractor's obligation to perform some contracts may actually be dependent upon GFP, especially if a contract requires the use of a controlled or limited resource. A listing of GFP doesn't cover the complexities involved because demands and availabilities are subject to change. At negotiations, the parties should identify all requirements in

general, establish specific demands where possible, and document all critical schedules and dependencies as far as possible [Ref. 5:p. 278].

The remainder of this chapter will describe GFP in terms of the types of GFP, reasons for providing GFP to contractors, the contractor's responsibilities, Government's responsibilities and the assumption of risk, followed by an explanation of the Contract Disputes Act of 1978 and the appeals process.

B. TYPES OF GFP

This section will define five types of GFP, which are facilities, special tooling, special test equipment, material and agency-peculiar property. Classifying GFP into these five broad categories is important for management purposes. There are different policies on furnishing different types of property [Ref. 4:p. 4-28].

1. Facilities

Facilities are divided into two categories. First, real property is land and rights therein, ground improvements, utility distribution system, buildings, and structures. Generally, real property is nonseverable once it has been installed. Second, plant equipment is personal property of a capital nature used in manufacturing supplies or performing services [Ref. 4:p. 4-28].

2. Special Tooling

Special tooling is an item of such a specialized nature that, without substantial modification, its use is limited to the development or production of particular items. The major differentiating characteristic of special tooling from plant equipment is the word "special" [Ref. 4:p. 4-29].

3. Special Test Equipment

Special test equipment is designed to perform special purpose testing in the performance of a contract. The key characteristic of this type of equipment is that it consists of items or assemblies of equipment interconnected and interdependent so as to become a new functional entity for special testing purposes [Ref. 4:p. 4-29]

4. Material

Material is property that may be incorporated into or attached to an end item to be delivered under a contract. It may also be an item consumed in the performance of a contract [Ref. 4:p. 4-29].

5. Agency-Peculiar

Agency-peculiar is property unique to the mission of one agency such as "military property" in DoD. This would include an end item or integral component of a military weapon system [Ref. 2:p. 4-29].

C. REASONS FOR PROVIDING GFP

The Government furnishes property to contractors for a variety of reasons. This section will provide a few of those reasons and a brief explanation. A list of examples follows.

1. Type of Contract

When using a cost-reimbursement type contract, all property is, by definition, Government-owned property, if it is acquired or produced and paid for by the Government [Ref. 4:p. 4-31].

2. Economy

By furnishing the contractor with property that the Government already owns, the cost to acquire the item may be reduced [Ref. 4:p. 4-31].

3. Standardization

To assure uniformity of an end item, the Government may furnish property when several contractors are working to produce a similar item [Ref. 4:p. 4-31].

4. Security

If the performance of a contract requires the use of classified items, then these items may only be provided by the Government [Ref. 4:p. 4-31].

5. Increased Competition

If some tooling or machinery is very expensive the Government may be able to increase the number of potential bidders by offering this type of equipment as Government furnished equipment (GFE) [Ref. 4:p. 4-31].

6. Support of Small Business

To support the DoD policy to aid small business, certain expensive or unique items of equipment may be provided as GFE [Ref. 4:p. 4-31].

7. To Expedite Production

If the Government has in stock some type of material required for production that normally requires a long leadtime, the Government may be able to substantially reduce the leadtime of the end item by providing this material [Ref. 4:p. 4-31].

8. Scarcity of Assets

In some cases only the Government can guarantee the availability of certain items due to the critical nature or limited supply of the item [Ref. 4:p. 4-31]. This is particularly true with some controlled resources.

9. To Maintain the Industrial Base

There are certain items required in case of a major war that private industry is neither willing nor able to maintain. In these cases GFP must supplement private industry [Ref. 4:p. 4-31].

D. CONTRACTOR'S RESPONSIBILITIES

The contractor's management of GFP responsibilities involve the development and implementation of a property control system. In general, the contractor's responsibility for GFP can be summarized as follows:

- Use the property only for authorized purposes.
- Account for such use.
- Maintain and control it properly.
- Dispose of it as directed.
- Protect the Government's ownership interests.
[Ref. 4:pp. 4-32, 33]

E. GOVERNMENT'S RESPONSIBILITIES

The Government has two major responsibilities in regards to GFP. First, the Government is responsible for the timely delivery of GFP. The property must be delivered to the contractor at the times stated in the schedule or, if not stated, in sufficient time to enable the contractor to meet the contract's delivery or performance dates. Second, the Government is responsible for delivering GFP in a condition suitable for its intended use. The one exception to this is if the property is furnished on an "as is" basis [Ref. 4:p. 4-33].

F. ASSUMPTION OF RISK

Basic DoD policy is to not hold a contractor responsible for loss of, or damage to, GFP when such property is provided under a facilities contract, a noncompetitive negotiated, fixed-price contract, or a cost-type contract. The risk of loss for GFP depends upon the pricing arrangement. The remainder of this section will describe the contractor's assumption of risk, based on whether the contract is

competitive fixed-price, cost-reimbursement or noncompetitive negotiated, fixed-price [Ref. 4:p. 4-35]. For a more detailed view, Appendix A provides the property clauses applicable to these types of contracts [Ref. 3].

1. Competitive Fixed-Price

Competitively awarded fixed-price contracts hold the contractor liable for any loss or damage to the GFP except reasonable consumption, or wear or tear. The contractor is responsible for providing insurance for the GFP and it does not make any difference if a loss or damage occurs where negligence is not involved. In this case, the risk is placed on the contractor [Ref. 4:p. 4-35].

2. Cost-Reimbursement

Under a contract awarded as cost-reimbursement the Government acts as a self-insurer and assumes all risks. Generally, under cost-type contracts the only thing a contractor can be held liable for is willful misconduct or lack of good faith of top management [Ref. 4:p. 4-35].

3. Noncompetitive Negotiated, Fixed-Price

Under this type of contract the price is not based on adequate price competition, established catalog or market prices, or prices set by law or regulation. The risk is basically the same as under a cost-reimbursement contract. The contractor is only at risk for the loss if it is the result of willful misconduct of the contractor's top managerial personnel [Ref. 4:p. 4-35].

G. CONTRACT DISPUTES ACT OF 1978 AND THE APPEALS PROCESS

As the U.S. Constitution was originally written, the only remedy a contractor had when there was a contract dispute was a private bill through Congress. Since then the contract disputes procedures have continually expanded. The current procedures are supplied by the Contract Disputes Act of 1978 (PL 95-563). These procedures are applicable to all contracts entered into after 1 March 1979 [Ref. 4:p. 60].

There are some exceptions, but basically, the Act covers any express or implied contract for the purchase of property (other than real property), services, construction, alteration, repair or maintenance of real property, or disposal of personal property [Ref. 4:p. 60]. Appendix B provides a more detailed summary of what is covered under the Act [Ref. 6:p. 950]. In cases where a contractor files a claim under the Act that is subsequently found to be fraudulent, the contractor is liable for the amount unsupported by the claim and the Government's cost of reviewing the claim [Ref. 4:p. 60].

Under this Act all claims must be submitted in writing to the contracting officer for decision [Ref. 4:p. 60]. The contracting officer must render his decision within 60 days for claims of \$50,000 or less. When the contractor's claim involves a certified claim over \$50,000, the contracting officer must issue his decision within 60 days or notify the contractor of the time the decision will be issued [Ref. 6:p.

949]. The time must be reasonable, depending upon the monetary value of the claim [Ref. 4:p. 60].

After the contracting officer renders his final decision, the contractor may appeal to either the agency Board of Contract Appeals (BCA) or the U.S. Claims Court. The appeal must be to the BCA within 90 days from the date of receipt of the Contracting Officer's Final Decision (COFD) or to the U.S. Claims Court within one year. The BCA's decision can be appealed to the Court of Appeals for the Federal Circuit within 120 days after receipt of the decision [Ref. 4:p. 60]. The U.S. Claims Court decision may also be appealed to the Court of Appeals for the Federal Circuit, but this appeal must be made within 60 days after receipt of the Court's decision. Appendix C contains a diagram which clearly shows the flow of this process, including time frame requirements, from claim initiation to settlement [Ref. 6:p. 949].

III. CASE SYNOPSIS

A. GENERAL

This chapter provides a synopsis of each of the 11 cases selected for analysis based on the criteria established in Chapter I. The full case text contains the findings of fact and the board decision. This synopsis summarizes the findings of fact and board decision for each of the 11 cases. The case presentation is arranged by the reason the ASBCA used to justify its decision to sustain the appeal against the Government. Within these categories the cases are arranged by the chronological date of the sustained appeal.

B. INDIVIDUAL CASE SYNOPSIS--CATEGORY ONE: GFP NOT SUITABLE FOR ITS INTENDED USE

1. Case 1--Bogue Electric Manufacturing Company, ASBCA 25,184 and 20,606, 10 March 1986 [Ref. 7]

a. Findings of Fact Summary

The Government awarded a contract to Bogue for the manufacture and delivery of diesel generator sets on 26 August 1976. A generator set consists of a diesel engine and a generator mounted on a skid base with two control cabinets and various auxiliary parts. The contract was a multi-year (three year) contract with options to increase each year's quantity.

In an attempt to standardize the design of generator sets acquired for the military, the Government had a

competitive run-off between Onan Corporation and Consolidated Diesel Electric Corporation. Onan was selected, in the early 1970's, to design and furnish prototype sets. After experiencing several component failures, the technical data package (TDP) was purchased from Onan and became a part of Bogue's contract. When the Government purchased the TDP, the design rights for the Onan engine were not included. Therefore the engine design remained proprietary and the engines were prescribed as items to be purchased from Onan.

Difficulties began to arise when Bogue began negotiating a contract with Onan (Directed Sole-Source) for the engines. On 29 December 1976, Bogue notified the contracting officer of these difficulties and suggested that the engines be furnished as GFP.

On 6 January 1977, the contracting officer issued a default clause cure notice advising Bogue that if a purchase order wasn't placed for the required Onan engines, contract performance would be endangered. Under pressure of the cure notice, Bogue signed a purchase order on 26 January 1977 under Onan's terms.

By 26 August 1977, Bogue was having financial problems and also having difficulty passing first article testing. The contracting officer refused to provide financial assistance until Bogue had exhausted all other possibilities, but did extend the first article test report from mid-June 1977 to 30 November 1977.

Bogue failed to meet the new delivery schedule and was sent a show cause letter on 27 December 1977. Bogue responded to the show cause letter and submitted its first article test report on 25 January 1978. On 13 March 1978, the report was rejected and Bogue was supplied with a detailed account of tests to be reperformed.

Financial and first article test problems persisted throughout most of 1978. The Government tried to assist Bogue in various ways without defaulting the contract because of the urgent requirement for the generator sets. On 2 November 1978, the contracting officer modified the contract making the Onan engines and governor control cables GFP. To alleviate the financial problems the Government provided 100% progress payments.

The contracting officer conditionally approved Bogue's first article test on 15 January 1979. The first article test was not unconditionally approved due to problems relating to the engines, which were being furnished as GFP.

On 23 May 1979, Bogue advised the contracting officer that it had sustained increased costs due to delay attributed to the Government. Bogue requested either extraordinary relief under Public Law 85-804 or an equitable adjustment in the contract price.

The first shipment of engines arrived at Bogue on 5 September 1979. On 11 September 1979, Bogue advised the contracting officer that three of the engines had been damaged

during shipment and 40% of the crates were damaged. The Government then inspected Bogue's storage facility and determined that it was inadequate for security of GFP. The GFP was diverted to Government storage and only one month's supply was allowed at Bogue.

Problems continued into 1980. In March 1980, Bogue reported that Onan engines were beginning to fail at a rate of 50%. On 21 March 1980, Bogue's counsel advised the Government that a cardinal change (a change outside the scope of the contract, which cannot be made under the changes clause) may have occurred. Counsel further advised that if a cardinal change had occurred, Bogue would be under no obligation to continue performance, but would continue work as long as funds permitted.

Bogue's application for relief under Public Law 85-804 was denied on 25 April 1980. Then, on 10 June 1980, a letter from Bogue's counsel to the Government stated, in part, as follows:

You are advised that as a result of your wire of June 9, 1980, as well as our experience with the GFE engines and Onan's inability to bring these units into specification so that Bogue can obtain reasonably satisfactory and consistent specification results in manufacture, Bogue lacks the confidence to again proceed with the performance of the contract to completion.

On 13 June 1980, progress payments were formally suspended by the contracting officer. Then, on 23 June 1980, a letter from Bogue's president to the Government stated, in part, as follows:

We have already advised you that based upon late and defective GFP and the suspension of progress payments, Bogue will be unable to mount any production effort towards completion of the performance of the contract.

After receipt of the above two letters the contracting officer concluded that Bogue had abandoned production and terminated the contract for default on 1 July 1980. It was later found that Bogue had continued to perform until the default termination with the knowledge of Government personnel.

b. Decision Summary

The Government was responsible for the consequences of delivery of defective engines, as GFP, beginning in September 1979. The Government Property clause in the contract required delivery by the Government of property that was suitable for the use in the contract. The GFP engines clearly did not meet this standard.

The suspension in progress payments resulted in the two letters which caused the contracting officer to terminate the contract for default based on repudiation and abandonment. This failure was directly related to the defective GFP. This material breach on the part of the Government was so severe as to provide Bogue with the right of avoidance.

The appeal of the default termination (25,184) was sustained and converted to a termination for convenience. The appeal for the contract price to be equitably adjusted

(29,606) was approved to the extent that delay and disruption costs were incurred by late delivery and delivery of defective GFP.

2. Case 2--Tally Construction Company, ASBCA 31,294, 12 May 1987 [Ref. 8]

a. Findings of Fact Summary

The Government awarded Tally Construction Company a contract on 27 September 1983 to construct a canine kennel facility. The facility was to be constructed using a Government furnished, pre-engineered, steel structure, complete with all interior finish work.

The standard erection details, included in the contract, were written by Gulf States Manufacturing Inc. Tally notified the Government by letter on 24 December 1983 that the siding provided by the Government was not in the normal three foot-wide sections, but was one foot wide and not Gulf State siding. Later, in an attempt to stay on schedule, Tally began field-cutting the siding and attempted to make the Government Furnished window and door frames fit.

On 21 February 1984, the Government responded to Tally's 24 December 1983 letter, stating that the one foot-wide siding and pre-finished siding in the dog storage area had been addressed during the pre-bid site visit. The Government also made reference to drawing D-1, which is a blueprint drawing with Gulf State's name on it, dated 14 April 1983.

The Government contended that drawing D-1 was part of the contract.

Tally disagreed with the Government and on 19 November 1984, filed the following claims, among others, due to unsuitable GFP:

Claim 1: \$9,349.20 for installation of one foot panels and door and windows that were not made by Gulf States and were incompatible.

Claim 6: \$3,050.80 for installing the one foot interior paneling in the dog storage area.

The other claims are omitted because either they were not sustained in favor of the contractor or were dismissed.

b. Decision Summary

The Board found that drawing D-1 was not a part of the contract since neither the contract nor the specifications referenced it. The Board further found that the paneling was not visible to Tally during the pre-bid site visit. Based on these findings, Claim 1 and Claim 6 were both sustained.

3. Case 3--Oklahoma Aerotronics, Inc., ASBCA 25,605, 27,879 and 28,006, 5 June 1987 [Ref. 9]

a. Findings of Fact Summary

In July 1977, the Government awarded a contract to the Small Business Administration (SBA) for the modernization of three AN/URC-56 communication van systems. Simultaneously, SBA subcontracted with Oklahoma Aerotronics Inc. (OAI) for fulfillment and performance of the contract requirements.

Contract performance lasted for a period of over three years. During this time a number of delays were

attributed to late or defective GFE, as illustrated by the following examples. OAI considered this to be the biggest problem it encountered during contract performance, causing extensive delays and extra costs.

- KY-585's: The first two were to be received by 15 August 1977, but didn't arrive until 23 March 1978. When they did arrive, the mounts weren't furnished and one was inoperative.
- KG-36's: The first one was three months late and others were late throughout contract performance.
- OAI claimed it was delayed a total of 36 months due to late delivery or defective KY-585's and KG-36's.
- Other examples of late or defective GFE included KY-28's, KY-75's and KY-58's.

On 9 June 1980, the contracting officer issued a bilateral modification to the contract extending the delivery schedule and containing a release of claims clause. On 7 July 1980, OAI received a show cause notice, which stated that the Government was considering terminating the contract for default due to OAI's failure to show adequate progress toward meeting the delivery schedule. OAI responded, on 8 July 1980, saying that the Government had contributed to its difficulties by not properly describing the first van and GFE in the contract documents and by delivering GFE late.

Following further delays and schedule changes, the Government unilaterally established a new delivery schedule on 20 August 1980. On 21 August 1980, OAI informed the Government that three of the Government furnished ARC-131's and the Government furnished HF 22B system were not working.

OAI was still working on Revision A to the Acceptance Test Procedure (ATP).

On 22 October 1980, the contracting officer terminated the contract for default. The Government reprocured by sole source through Rockwell International Corp., based on emergency acquisition justification.

On 16 December 1982, OAI was assessed excess reprocurement costs of \$5,433,760.65. On 22 December 1982, OAI filed the following appeals:

- 25,605--Conversion of the default termination to a termination for the convenience of the Government.
- 28,006--Remission of the excess reprocurement cost assessment.
- 27,879--Extra compensation, plus interest due to defective specifications and GFE, missing technical information and documentation and late GFE.

b. Decision Summary

The decision summary is in three separate parts by appeal number.

(1) ASBCA 25,605--The Default Termination. Due to the modification issued in June 1980, the propriety of the termination of the contract in October 1980 must be based on circumstances existing in June 1980 and the events that transpired thereafter. When the Government unilaterally issues a new delivery schedule, as it did on 20 August 1980, that schedule must be reasonable from the standpoint of the performance capabilities of the contractor at the time the notice is given. In this case, OAI didn't even submit

Revision A to the ATP for approval until 25 August 1980 and some GFE items were still defective and needed repair or replacement by the Government. Based on these reasons, the unilateral schedule was found to be unreasonable and the appeal was sustained.

(2) ASBCA 27,879--Claims for Extra Compensation.

As noted above, OAI released the Government, in June 1980, of all prior claims. The only claims eligible for extra compensation were those occurring after the June 1980 modification. The appeal was sustained for Government furnished ARC-131's and HF equipment.

(3) ASBCA 28,006--Excess Reprocurement Costs.

Since the default termination was converted to a termination for convenience, the Board automatically sustained this appeal.

4. Case 4--Hollfelder Technische Dienste Ingenieurgesellschaft MBH, ASBCA 28,138, 15 December 1987 [Ref. 10]

a. Findings of Fact Summary

The Government awarded ten contracts in October 1980 to Hollfelder Technische Dienste Ingenieurgesellschaft MBH of Germany to run various military boiler heating plants in ten military communities in Germany. The contract called for the Government to provide anthracite coal to Hollfelder, which was procured, as required by U.S. law, from mines in Pennsylvania under contracts referred to as coal supply contracts.

Once the coal was received and inspected by the Government in Germany, local Government contract labor unloaded the shipment, then reloaded and transported the coal to various military communities. The coal handler contract instructed the handlers to properly mix the coal before loading, so that the coal provided to Hollfelder would be substantially the same sizes and tolerances as specified, delivered and accepted under the coal supply contracts.

As early as December 1980, Hollfelder began protesting the inferior quality of the coal, causing extra work on the part of the boiler fireman. On 13 July 1981, a meeting was held between the contracting officer and Hollfelder. It was generally agreed that there was a problem with the coal size. The contracting officer attributed the problem to the coal handlers. After the meeting, the contracting officer sent a letter to the coal handlers instructing them to follow the contract requirements. He specifically instructed them to mix the coal properly and be careful in handling the coal to prevent breakage. The problem persisted throughout contract performance with the contracting officer sending additional letters to the coal handlers.

Since the boiler heating plant contracts did not specify the coal size requirements, there was also a disagreement as to what actual specification should be followed. The contractor preferred to use a German specification, which was

much more strict than the U.S. Government coal supply contracts. Eventually, Hollfelder conceded this point.

USAREUR PAM 420-60 was also incorporated in the specification to Hollfelder's contracts. It basically says that solid fuel shall meet contract specifications. The "contract specifications" are clearly those in the coal supply contracts.

b. Decision Summary

The Government was required to provide a certain quantity of coal suitable for its intended purpose. There is no question to the fact that the Government provided the proper quantity of coal. The question is whether it was suitable for its intended purpose. The Government in its defense said the requirement was satisfied by providing coal that would burn. The Board sees this as inconsistent with the provisions of USAREUR PAM 420-60 and the evidence, which showed that the Government believed that it should be providing coal within the tolerances specified in the coal supply contracts. The contracting officer's letters to the coal handlers are compelling evidence of the Government's recognition that coal furnished to Hollfelder had to be substantially the quality as specified in the coal supply contracts.

The Board concluded that the proper specifications were those contained in the coal supply contracts; that the Government did not consistently furnish coal meeting those standards; that this entailed extra work for the firemen,

although it could not conclude on extra cost for that extra work; and at least increased Hollfelder's costs in administration of the contracts. Therefore, the Board sustained Hollfelder's appeal and returned it to the parties to negotiate quantum.

5. Structural Systems Technology, Inc., ASBCA 36,950, 13 February 1989 [Ref. 11]

a. Findings of Fact Summary

The Government awarded a contract on 25 September 1986 to Structural Systems Technology, Inc., for the repair of an antenna tower at Silver Creek, Nebraska. The contract called for the Government to provide various items as Government furnished material (GFM).

The contract placed certain requirements on the contractor in regard to GFM. The contractor was to inspect the socketed strands of steel guy wire upon arrival and before installation. With respect to the bridge stand, alumoweld, insulators, connectors and other parts of the guy system, the contractor was required to inspect before erecting.

During the course of contract performance, the contractor discovered problems with the guy wires, link plates and insulator bolts. The following illustrates when and what problems the contractor found.

- The guy wires were supposed to be 400 feet long, but when the contractor attempted to install them, on 8 April 1987, it was determined that they were only 391 feet long. The Government replaced the guy wires on 1 May 1987.

- On 8 April 1987, the contractor found that the link plates for level four were the incorrect size. The Government had new link plates manufactured and delivered to the contractor on 28 April 1987. On 22 April 1987, the contractor found that link plates for level one were too narrow. The same problem was found on 15 May 1987 for the link plates for level three. The Government directed the contractor to grind them down to the proper size.
- On 9 April 1987, the contractor found that the one and three-quarter inch bolts for level four guy installation were too short. The correct size bolts were delivered on 14 April 1987. On 14 April 1987, the contractor found that it did not have the correct size bolts to assemble the insulators for levels one, two and three. The correct bolts were received on 21 April 1987.

Based on the above problems, Structural Systems submitted a claim to the contracting officer for equitable adjustment. After the contracting officer issued his final decision denying these claims, Structural Systems filed this appeal.

b. Decision Summary

The Board denied Structural Systems' appeal for equitable adjustment regarding the guy wires because the contract specifically stated that the contractor was required to inspect the guy wires upon arrival and prior to installation. The appeal was sustained for the link plates and insulator bolts because the contract did not contain a special inspection requirement for these items, as it did for the guy wires.

6. Case 6--Hart's Food Service, Inc., d/b/a Delta Food Service, ASBCA 30,756 and 30,757, 10 April 1989
[Ref. 12]

a. Findings of Fact Summary

The Government awarded a contract to the SBA on 26 September 1983 for the performance of services required to run two food service/dining facilities at Brooke Army Medical Center. The SBA concurrently awarded a contract to Hart's Food Service, Inc., for contract performance. The contract required the use of GFE in the performance of required services. Furthermore, the contract stated that all supplies and equipment would be furnished by the Government, except dining attendant uniforms, hats, hair nets and badges. There were well over one thousand items of equipment in both dining facilities combined.

Equipment break-downs and maintenance problems began shortly after commencing contract performance. Some of the most problematic equipment and maintenance problems are listed as follows:

- Clipper or dishwashing machines did not function properly much of the time.
- Ice making machines and ice dispensing machines did not function properly.
- Vegetable slicers and potato peelers were repeatedly inoperable.
- Push carts to move dishes and trays were frequently and constantly in disrepair.
- Garbage can washers at Dining Facility No. 2 seldom worked.

- Garbage disposals were frequently and constantly inoperative or in need of repair.
- Constant water and steam leaks from water and steam pipes, faucets, and from items of equipment.

The problems listed above required additional man-hours to manually do what the equipment was supposed to do. For this reason Hart submitted a claim for equitable adjustment. After the contracting officer denied the claim, Hart filed this appeal. An appeal was also filed concerning payment deductions (30,757) due to poor weekend inspection results. Although this appeal was also sustained, it does not deal with GFP, therefore it is not considered for purposes of this study.

b. Decision Summary

Hart Food Service contends that increased labor hours were required as a result of the facilities' poor maintenance condition and the Government's failure to provide equipment suitable for contract performance. The Government has not disputed the facts surrounding these problems, but contends that the problems were not as severe as described, and that, in any event, Hart failed to show that it incurred any additional labor hours or extra work. The Government further contended that if the conditions did require Hart to generate additional labor hours or extra work, Hart has no basis to complain because it failed to conduct a pre-bid inspection.

The Board disagreed with the Government. The Board found that GFE was not consistently suitable for their intended purposes throughout the contract term. This adversely impacted Hart's ability to efficiently and economically perform the contract. Furthermore, the magnitude of the equipment and facilities' problems or their respective and continuing nature would not have been apparent even if a pre-bid site inspection had been conducted. Therefore, the Board sustained the appeal for extra labor hours due to unsuitable GFE.

C. INDIVIDUAL CASE SYNOPSIS--CATEGORY TWO: GOVERNMENT FAILURE TO DELIVER GFP

1. Case 7--Essex Electro Engineers, Inc., ASBCA 30,119, 13 May 1986 [Ref. 13]

a. Findings of Fact Summary

The Government contracted with Essex Electro Engineers, Inc., on 30 September 1980 to supply Microelectronic Repair Equipment Sets. Each set includes mechanical drive unit, solder extractor unit, and handtool power supply.

As the contract performance progressed, Essex contended that it experienced substantially increased performance costs because of, among other things, missing GFP. The Government acknowledged the problems and sought to correct the deficiencies by issuing unilateral contract amendments.

On 11 January 1982, Essex submitted an equitable adjustment claim for \$250,075. The Administrative Contracting

Officer (ACO) returned the claim on 19 January 1982 for perceived inadequacies. On 1 February 1982, Essex again submitted its claim along with additional cost information. The claim was again returned to Essex on 25 February 1982.

Claims continued to be submitted and rejected by the Government. Negotiations were also ongoing with the ACO. Finally, Essex sent the Government a letter which stated, in part, as follows:

On 26 April 1983 we entered into a verbal agreement with the Government to settle our claim under Contract #N00123-80-C-0588 for \$198,198. At the time we agreed to the settlement the Government informed us that we would receive a settlement agreement and payment within 65 days. Today we have no agreement and no payment. We therefore amend our claim under contract #N00123-80-C-0588 to the settlement amount of \$198,198.

After the above letter was sent, a new ACO disavowed the alleged verbal settlement. On 16 July 1984 the contracting officer made his final decision determining an equitable adjustment in the amount of \$84,320.

b. Decision Summary

Essex's claim was submitted in two parts. Count I seeks to enforce the alleged agreed settlement in the amount of \$196,189. It was not clear why this amount is less than the \$198,198 cited in Essex's letter in the findings of fact. As an alternative, Count II was submitted for \$369,590. The Government made a motion to dismiss Count II because it had not been submitted to the contracting officer for determination. The Government's motion was denied because Essex

clearly and repeatedly filed a claim for equitable adjustment arising out of alleged missing GFP and other deficiencies. Count II is part of the same claim for equitable adjustment.

Although it was clearly decided that a claim for equitable adjustment had been submitted and Essex had an entitlement, no decision was made as to if Count I should be enforced. Without a statement, as such, it is assumed the matter was reverted to the parties to negotiate the proper amount.

2. Case 8--H.N. Bailey and Associates, ASBCA 29,298,
4 February 1987 [Ref. 14]

a. Findings of Fact Summary

The Government awarded H.N. Bailey and Associates a contract on 21 May 1980 for the supply of 123 parts kits for the B-52 aircraft. Some of the 32 line items of hardware that made up these kits were to be GFP.

After the award Bailey moved his Kit Pack Division from Santa Ana, California to Dona Ana, New Mexico. Sunstrand Operations in Rockford, Illinois was issued a contract to supply Bailey with GFP consisting of four types of roller bearings. The contract called for the GFP to be sent to Bailey's Santa Ana facility. Bailey tried, unsuccessfully, to persuade the Government to amend Sunstrand's contract to have the GFP shipped directly to Dona Ana.

Bailey established procedures for receiving the GFP at Santa Ana and transshipping them to Dona Ana. The

boxes were normally unopened at Santa Ana. The transshipment that is the subject of this case arrived at the Dona Ana facility on either 21 or 22 January 1982. Due to a backlog of GFP requiring processing, this shipment wasn't processed until 15 February 1982. Instead of 245 bearings, as indicated on the DD Form 250, only 135 bearings were accounted for during the inspection of the shipment.

An investigation was conducted at both Bailey facilities and at Sunstrand. Bailey found no bearings that couldn't be accounted for at either of its plants. The subject bearings were only used in B-52 aircraft kits and the Air Force was the sole customer for these kits. Based on weight, it appears that only 135 bearings were transshipped from Santa Ana.

b. Decision Summary

The Government Property clause creates a bailment when goods are delivered to the contractor. Under the bailment, the contractor is responsible for the risk of loss. Before determining the burden of the risk of loss, it must be determined if a bailment actually existed. In this case, the Government failed to provide sufficient evidence that Bailey ever had control or custody of the missing bearings.

There were also several unexplained discrepancies on the DD Form 250 and in the way the shipment was processed. The shipping code indicated UPS, but block 23 indicated Parcel Post. Block 23 also indicated a sales order number, which

corresponded to a Sunstrand's PIC ticket number, but the PIC ticket indicated a destination of GSK, Inc.

Based on the weight of the evidence, the Board sustained Bailey's appeal, concluding that only 135 bearings were received.

D. INDIVIDUAL CASE SYNOPSIS--CATEGORY THREE: GOVERNMENT FAILURE TO COMPENSATE FOR ADDITIONAL COSTS ASSOCIATED WITH ADDITIONAL ITEMS OF GFP

1. Case 9--JBS Missouri, Inc., ASBCA 34,044, 4 June 1987
[Ref. 15]

a. Findings of Fact Summary

The Government awarded a contract on 28 July 1983 to JBS Missouri, Inc., to provide mess service attendants who would serve food and clean, replenish and maintain certain GFE at specified intervals to specified standards. The GFE consisted of various Food Service equipment detailed in a listing provided as part of the initial solicitation.

The contract provided that the Government reserved the right to furnish replacement or other new equipment to improve food service methods or output. The contract further stated that all such equipment shall be used and maintained by the contractor at no additional expense to the Government.

During the course of the contract the Government added and deleted various pieces of equipment. In many cases, the addition of equipment involved equipment that was not previously in place. On 20 May 1985, the contracting officer issued a modification to the contract to cover the various

additions and deletions of equipment stating that the change should be "at no additional cost to the Government." This modification also increased the cleaning frequency on various GFE from once a day to three times a day.

JBS disagreed with the contracting officer's interpretation and filed a claim on 26 August 1986 seeking additional compensation for the added GFE and increased cleaning frequency of some items. This claim was denied by the contracting officer on 7 October 1986.

b. Decision Summary

The Board disagreed with both parties' interpretation of the contract. Since this interpretation centers around paragraph 3.2, it is quoted as follows:

Equipment. (As listed in Technical Exhibit 4.) If the contractor considers that additional items of equipment will improve services being furnished, he/she shall request the equipment in writing. Requests for new equipment notwithstanding, the contractor is expected to meet contract requirements with existing equipment. The Government reserves the right to furnish replacement or other new equipment to improve food service methods or output. All such equipment shall be used and maintained by the contractor at no additional expense to the Government. The contractor shall provide minor maintenance on all equipment.

In disagreement with JBS, the Board stated that the contract does address the Government's right to furnish either "replacement or other new equipment." In disagreement with the Government, the Board stated that the contract limited the contractor's duties regarding the new equipment to using it in the food dispensing function and to providing the maintenance periodically required. The Board did not read the

contract as precluding compensation for additional costs of cleaning and replenishing the new equipment. There was also no support for the Government's refusal to compensate for the cleaning frequency being tripled for various GFE.

Based on the Board's interpretation of the contract, JBS's appeal was sustained.

E. INDIVIDUAL CASE SYNOPSIS--CATEGORY FOUR: EQUIPMENT SHOULD HAVE BEEN GFE VICE CFE

1. Case 10--Firco, Inc., ASBCA 37,829, 5 May 1989
[Ref. 16]

a. Findings of Fact Summary

The Government awarded a contract on 28 September 1987 to Firco, Inc., for construction of a Pizza restaurant. As originally conceived, the contract was to include 16 items of GFE. On 6 June 1987, when contract specifications were 98% complete, it was decided that there would be no GFE. Due to the end of the fiscal year spending rush, the award process was conducted on an expedited basis and the change from GFE to Contractor furnished equipment (CFE) was never made.

The Government tried to correct the above problem by issuing an addendum to its solicitation. The addendum included a specification 11A, which provided a description of some equipment listed as GFE on drawing 10278-2. The addendum also changed the Statement of Work deleting "(except Government furnished kitchen equipment)." The cover sheet (DD Form

1707) to the solicitation stated that GFP would not be provided. That statement was listed under "Visits to Site."

Firco did not include the price of the 16 items in its proposal. Firco interpreted the cover sheet to mean GFE would not be put on view for the site visit. Firco also felt that the inclusion of specification 11A in the addendum reinforced the clear language on the drawing that the 16 items would be GFE. The change in the Statement of Work did give Firco reason to pause, but after rereading, it was reaffirmed that GFE would be provided.

b. Decision Summary

It was clear that the Government intended for 16 items to be CFE, but drawing 10278-2 is clear that the Government is to furnish the equipment. The Board found that Firco's interpretation, as cited above, is reasonable and at no time during restaurant construction did the Government try to force Firco to provide the equipment. Based on reading the contract as a whole and taking into consideration the facts surrounding its formation and administration, the Board sustained the appeal.

F. INDIVIDUAL CASE SYNOPSIS--CATEGORY FIVE: GOVERNMENT FAILURE TO MAINTAIN ACCURATE RECORDS OF WHAT IT FURNISHED AS GFP

1. Case 11--Gary Aircraft Corporation, ASBCA 22,018,
17 November 1989 [Ref. 17]

a. Findings of Fact Summary

The Government awarded a contract in late 1970, with an effective date of 1 December 1970, to Gary Aircraft Corporation for the overhaul of R2800 engines and its various components for Government stock. The R2800 engine is a reciprocating engine used to power several vintage models of military aircraft.

During the course of contract performance, Gary received R2800 engines to overhaul and had complete requisitioning authority for serviceable GFP to be used to perform the overhauls. The requisitioning of GFP through the military supply system was conducted with little or no Government surveillance. Furthermore, the Government maintained no records of the unserviceable GFP delivered to Gary for overhaul.

Gary maintained manual records of all GFP located at each of its three Texas facilities. The Government placed total reliance on Gary's records. In 1971, Gary decided to mechanize its GFP stock records. Gary began this conversion by developing a system for serviceable GFP at its San Antonio facility. After the San Antonio application was complete,

Gary began to mechanize the serviceable GFP at its Victoria facility.

The next phase of mechanization development involved the unserviceable GFP. The Victoria facility was selected as the "Guinea Pig" for this phase. The unserviceable GFP mechanized system never got past the experimental state, which involved running a parallel processing system. This meant that both manual and mechanized records were maintained simultaneously. The official system remained the manual stock record system.

The problem began when Gary started submitting Inventory Adjustment Vouchers to the Government property administrator to correct the mechanized inventory system. These vouchers were being used to bring the mechanized system into agreement with the manual system.

On 22 May 1975, at the recommendation of the Government property administrator, the contracting officer forwarded his decision, holding Gary liable for the loss of an, as yet, undetermined amount of Government property. On 13 April 1977, a new contracting officer expanded on this decision, assessing Gary in excess of \$1.8 million for lost unserviceable GFP. Gary filed an appeal of this decision on 9 May 1977.

On 20 June 1977, the Bankruptcy Court for the Western District included this appeal as part of its proceedings. Following the denial of the Government's motion

challenging the Court's jurisdiction, the appeal was docketed and the trial began on 19 July 1977. On 29 June 1979, the Bankruptcy Court disallowed the Government's claim. The Government appealed the decision to the United States Court of Appeals for the Fifth Circuit. The case was reversed and remanded back to the Bankruptcy Court. The Bankruptcy Court had erred in not deferring the Government's claim to the ASBCA. The Government's claim was allowed to stay in the Bankruptcy Court pending ASBCA proceedings.

Gary also submitted, as evidence to the ASBCA, the actual mechanized transactions as reconciled with the manual records. A sample of those reviewed by the Board showed that issues and receipts were not regularly maintained on the mechanized records, but were maintained on the manual records.

b. Decision Summary

In an overhaul contract, a bailment relationship exists when the Government furnishes the property to be overhauled. In this type of relationship, ordinarily the contractor is responsible for the exercise of due care and is not responsible for loss that is not his fault. Furthermore, the Government bears the burden of showing that the goods were delivered to the bailee and that they were not returned. In this case, the Government is unable to produce evidence which establishes any loss, let alone in what particular amount. There was no conclusive showing of loss, only that perhaps poor records were kept. Therefore, the Board sustained Gary's

appeal, which was in agreement with the Bankruptcy Court's initial ruling.

IV. CASE ANALYSIS

A. INTRODUCTION

This chapter analyzes the 11 GFP cases presented in Chapter III. The analysis, first, explores the Board's reasoning for sustaining the appeal. Second, the analysis tries to determine what the contracting officer's reasoning was in making his final decision. Lastly, the analysis discusses what actions the contracting officer or other Government personnel should have taken regarding the GFP. The last section of this chapter presents and analyzes two tables containing data from the 11 GFP cases. The first table is a summary of GFP-sustained appeals and contract characteristics. The second table is a comparison of the five reasons the Board sustained the GFP-related appeals.

The case analysis is arranged by the reason the ASBCA used to justify its decision to sustain the appeal against the Government. Within these categories the cases are arranged by the chronological date of the sustained appeal. This arrangement matches the arrangement of the cases in Chapter III.

B. INDIVIDUAL CASE ANALYSIS--CATEGORY ONE: GFP NOT SUITABLE FOR ITS INTENDED USE

1. Case 1--Boque Electric Manufacturing Company [Ref. 7]

The BCA's decision was based on a combination of regulations and case law. The GFP engines were defective,

causing delays in contract performance. The Board saw this as a clear Government breach of the Government Property clause, which required the Government to provide property that was suitable for its intended use. The Board also decided that this breach was so severe that Bogue had the right of avoidance. The Board reasoned this based on a case law decision sustaining the appeal of Seven Sciences Inc.

There were several factors that contributed to the contracting officer's final decision to terminate the contract for default. The contract was awarded in August 1976 and was terminated for default in July 1980. During most of this time the contracting officer had been dealing with numerous problems associated with Bogue's financial condition and the defective GFP engines. These problems had caused numerous delays, followed by extensions to the contract delivery schedule. It appears that the contracting officer became frustrated and saw the two Bogue letters, cited in the Findings of Fact Summary, as a way out of the contract.

In making his decision to terminate the contract for default, the contracting officer should have considered all the facts, not just the two letters from Bogue. He should have considered the possibilities of an appeal of his decision and what effect the Government's failure to live up to its contractual obligations would have on that appeal. In particular, the contracting officer should have considered the Government's failure to deliver GFP engines suitable for their

intended use. The contracting officer should have determined if, in fact, Bogue had stopped contract performance. Furthermore, if other Government personnel were aware that Bogue was continuing contract performance, they should have notified the contracting officer.

2. Case 2--Tally Construction Company [Ref. 8]

The Board's decision in this case was primarily based on the Government's failure to provide adequate erection instructions in the contract for the GFP steel structure. The decision was also based on the GFP paneling not being visible during the pre-bid site visit. Although the GFP clause requires that material be suitable for its intended use, it was not the basis for this decision. The Board's decision was arrived at from reading the contract as a whole. There was a discrepancy between what GFP the Government provided and what was required by the standard erection details. The standard erection details called for three foot-wide paneling, while the Government furnished one foot-wide paneling.

The contracting officer's reasoning was based on two incorrect claims. First, the contracting officer's interpretation of the contract was that drawing D-1 was incorporated into the contract by the technical specifications. Second, the contracting officer claimed that the one foot panels were pointed out during the pre-bid site visit.

The key to avoiding this problem was during contract formulation. The contracting officer should have ensured that

the contract was clear on both the building erection instructions and what GFP was to be provided. A detailed list of GFP cross-referenced to the proper erection instructions would have been sufficient. Also, if the GFP paneling had been visible at the pre-bid site visit or the Government had provided erection instructions using the one foot-wide paneling, the problems could have been avoided.

3. Case 3--Oklahoma Aerotronics, Inc. [Ref. 9]

The Board's decision to convert the termination for default to a termination for convenience was based on several prior appeals where the Government had unilaterally established an unreasonable delivery schedule. In this case, the schedule was unreasonable due to the Government's failure to provide GFE suitable for its intended use. As for the claims for extra compensation, the Board's decision was based on the GFP clause, which requires the Government to provide GFP suitable for its intended use. At the time of the contracting officer's unilateral decision, the Government had not corrected its failure to provide OAI with suitable GFE.

The contracting officer was under considerable pressure to force OAI to perform in order to meet critical milestone dates for delivery of the modernized communication vans. The contracting officer used the threat of terminating the contract for default to try to force the contractor to deliver by these dates. When this didn't work the contracting officer terminated the contract for default.

The contracting officer should have taken additional steps to remedy the defective GFE. These problems could have been corrected and allowed the contractor to perform. When the contracting officer unilaterally established the new delivery schedule, he should have considered the capabilities of the contractor that existed at the time of the modification. Particular attention should have been paid to Government-caused problems, such as the defective GFE.

4. Case 4--Hollfelder Technische Dienste Ingenieurgesellschaft MBH [Ref. 10]

The Board's reasoning was based on the GFP clause and the actions taken by the Government during the course of contract performance. First, the GFP clause, in effect, warranted that the coal furnished by the Government under the contracts would be suitable for its intended use. Second, the actions taken by the Government after meetings with Hollfelder showed that the Government believed that it should be providing coal of substantially the same quality as required under the U.S. Government coal supply contracts. A third factor the Board considered in making its decision was the USAREUR PAM 420-60. This was referenced in the contract and further substantiated that the correct coal specifications were those contained in the coal supply contracts.

The following reasoning led the contacting officer to decide not to allow Hollfelder's claim for additional costs associated with the Government's failure to provide GFP coal

of sufficient quality to meet its intended purpose. The contracting officer was procuring the coal as required by U.S. Government law. The coal was inspected upon arrival in Germany and determined to meet the coal supply contract specifications. The contracting officer had instructed the coal handlers to load the coal, so as to meet these requirements. Furthermore, the contracting officer did not believe that the undersized coal was actually causing Hollfelder to incur additional costs. Although the undersized coal required additional work for the firemen, the contracting officer felt that the job was still being done within the same amount of hours with the same number of firemen.

The contracting officer should have accepted his responsibilities under the GFP clause to deliver GFP coal that met contract specifications. A mutual inspection could have been conducted by both Government and contractor personnel upon delivery of the coal to the various boiler sites. When the coal did not meet the specifications, reimbursements could have been made based on an established reimbursement schedule. Furthermore, the coal handlers' contract could have included a similar requirement to encourage those contractors to load and deliver the coal to meet the specifications of the contract.

5. Case 5--Structural Systems Technology, Inc. [Ref. 11]

The Board's decision was primarily based on the GFP clause's requirement for the Government to furnish material

suitable for its intended use. Since the link plates and insulator bolts delivered by the Government were not the right size, they qualified under this clause. The Board further supported its decision that Structural Systems was entitled to an equitable adjustment if GFM is not suitable for its intended use, based on a case law decision in the sustained appeal of Marine Transport Lines.

The contracting officer realized there was a problem with some of the GFM delivered to Structural Systems. On several occasions, the contracting officer made modifications to the contract extending the delivery schedule due to problems with various GFM's having the wrong dimensions. It is unclear from the case why the contracting officer refused to negotiate an equitable adjustment for the Government-caused delays. It appears that the contracting officer felt that extending the delivery schedule was sufficient and that Structural Systems did not incur additional costs related to these delays.

The contracting officer should have established procedures to ensure that the correct size link plates and insulator bolts were delivered to the contractor. Failing to do that, an equitable adjustment should have been negotiated at the time the contract was modified to extend the delivery schedule.

6. Case 6--Hart's Food Service, Inc., d/b/a Delta Food Service [Ref. 12]

The Board based its decision on the GFP clause and provided several prior cases to support its interpretation of the clause. The Government's defense, which was based on Hart's failure to conduct a pre-bid site visit, was rejected based on a case law decision in a sustained appeal of James J. Temple. First, the pre-bid site visit would not have revealed the extent of the problems and second, even if Hart knew of the unsuitability of GFE prior to bidding, he had the right to expect the Government to cure it before performance was to start.

The contracting officer's reason for not allowing Hart's claim for equitable adjustment was primarily based on the defense that Hart failed to make a pre-bid site visit. The contracting officer's counsel supported this reasoning with a case where the appeal by American Combustion and Industrial Services Co., was denied. Furthermore, the contracting officer's decision was also based on his feeling that even if there were problems with the GFE, it was not so severe as to cause Hart to incur additional costs.

The contracting officer should have made sure that all bidders were aware of the condition of the GFE prior to submission of their proposals. The contractors would have been able to anticipate these costs in forming their bids. Since this did not happen, the command should have made every effort

to repair or replace the equipment or the contracting officer should have negotiated an equitable adjustment.

C. INDIVIDUAL CASE ANALYSIS--CATEGORY TWO: GOVERNMENT FAILURE TO DELIVER GFP

1. Case 7--Essex Electro Engineers, Inc. [Ref. 13]

The Board's decision, in this matter, was based on actions of the contracting officer and various cases involving sustained appeals. The Board viewed the contracting officer's initial decision to allow some amount of Essex's claim for the Government's failure to deliver GFP as evidence that the Government realized it clearly was at fault. The Board used several sustained appeals to support its decision that Essex was allowed to increase its claim amount because the character of the claim was unchanged.

Initially, there was an informal settlement between Essex and the ACO, but when a new ACO was assigned, knowledge of the settlement was disavowed. The new ACO's decision was an equitable adjustment based on a review of the existing record.

After the Government had agreed to a settlement, even verbally, that agreement should have been honored. If reasons were found to disallow already agreed-to costs, then those costs should have been explicitly stated in the contracting officer's final decision.

2. Case 8--H.N. Bailey and Associates [Ref. 14]

The Board's decision was based on case law and the GFP clause. Both prior-case decisions and the GFP clause support the Board's decision that Bailey is only responsible for the loss of GFP that is actually delivered. Several prior sustained appeals supported the Board's decision that the Government must be able to prove that it actually delivered the GFP bearings to Bailey and that they were not returned. In this case, the evidence convinced the Board that the Government could not prove delivery of the bearings.

The contracting officer's decision was based on the belief that Sunstrand had shipped the correct quantity of bearings as indicated on the DD Form 250. Since the GFP clause (Fixed Price) places the risk of loss on the contractor, the contracting officer claimed that Bailey was responsible for the \$19,030 loss of GFP.

The contracting officer should have conducted a more thorough investigation of the matter to determine not only if Bailey received the missing bearings, but also if Sunstrand actually shipped the correct quantity of bearings to Bailey. A closer investigation might have revealed that the missing bearings were actually shipped to another destination, such as GSK, Inc.

D. INDIVIDUAL CASE ANALYSIS--CATEGORY THREE: GOVERNMENT FAILURE TO COMPENSATE FOR ADDITIONAL COSTS ASSOCIATED WITH ADDITIONAL ITEMS OF GFP

1. Case 9--JBS Missouri, Inc. [Ref. 15]

The Board's decision was based on its interpretation of paragraph 3.2 of the contract. Neither the GFP clause nor case law were considered in this decision. The Board interpreted this paragraph as not precluding compensation for additional costs associated with new equipment and increased cleaning frequency of existing equipment.

On the other hand, the contracting officer's decision was also based on his interpretation of paragraph 3.2. The contracting officer's interpretation of this paragraph was that the Government had reserved the right to add equipment at no cost to the Government. The contracting officer also felt that JBS had not demonstrated that it had incurred any increased cleaning or maintenance costs associated with the additional equipment.

The contracting officer's interpretation was not the same as the Board's, but neither was the interpretation by JBS. Prior to making a final decision against JBS's claim, the contracting officer should have had the disagreement reviewed by legal staff and his boss. In particular, he should have found if they agreed with his interpretation of paragraph 3.2.

E. INDIVIDUAL CASE ANALYSIS--CATEGORY FOUR: EQUIPMENT
SHOULD HAVE BEEN GFE VICE CFE

1. Case 10--Firco, Inc. [Ref. 16]

The Board's decision was primarily based on a reading and interpretation of the contract. It was clear to the Board that drawing 10278-2 meant that the Government would furnish the equipment in question. The Board also used the sustained appeal of AVANTEK to support its decision that the solicitation cover sheet DD Form 1707, which stated Government property would not be provided, was not part of the contract.

The contracting officer's decision was based on the addendum attached to the solicitation and the solicitation cover sheet. The contracting officer felt that this was sufficient to make it clear that the Government wanted the contractor to furnish all equipment.

The problem was caused by the end of fiscal year spending rush to award contracts prior to 1 October of the following fiscal year. The contracting officer's addendum to the solicitation was a good solution, but more care should have been taken to ensure it represented what the Government actually intended. The contracting officer should have also held a pre-bid meeting and ensured that all the contractors understood what the Government meant by the addendum.

F. INDIVIDUAL CASE ANALYSIS--CATEGORY FIVE: GOVERNMENT FAILURE TO MAINTAIN ACCURATE RECORDS OF WHAT IT FURNISHED AS GFP

1. Case 11--Gary Aircraft Corporation [Ref. 17]

The Board's decision was based on case law. The sustained appeal of Meeks Transfer Co., supported the Board's decision that the Government bears the burden of showing that the engines were delivered to Gary and that they were not returned. Furthermore, the Board reasoned that since the Government maintained no records of what was delivered and relied on the inaccurate records of Gary, there was insufficient evidence to prove that Gary had failed to return GFP in any amount.

The contracting officer based his decision, to assess Gary \$1.8 million for the loss of unserviceable GFP, on 85 inventory adjustment vouchers and Gary's computer printouts. Since these 85 transactions were not auditable or traceable, the contracting officer made his decision to assess Gary the charges.

The property administrator should have maintained a system for monitoring the accuracy of GFP records. By monitoring the contractor's records, the property administrator would have been aware of the problem Gary was having implementing its mechanized non-serviceable GFP inventory records. The property administrator would have known the condition of the manual records and could have advised the contracting officer prior to his decision to assess Gary charges.

G. GFP TABLE ANALYSIS

Tables 4.1 and 4.2 are an accumulation of certain data from the 11 cases selected for this research. This section will analyze these two tables to ascertain if any trends have developed in the four years considered in this research.

Table 4.1 lists many different types of GFP, from highly technical communications equipment to raw materials, such as coal. Problems associated with furnishing food service or restaurant equipment ranks first with three of the 11 cases involving this type of GFP. From the limited data presented here, it appears that the GFP cases with more recent COFD's are having shorter dispute durations.

Table 4.2 suggests that the biggest problem with GFP has been the Government's failure to provide GFP suitable for its intended use. The table shows that over half of the 11 appeals were sustained for this reason. The second biggest problem area is the Government's failure to deliver GFP. Although the other reasons indicated in the table have lower percentages, they point out some important areas that the contracting officer needs to consider when GFP is involved in a contract. Table 4.2 also suggests that case law is the most highly relied-upon basis to support the Board's decision. This is followed by the GFP clause. The table also shows that in many cases both case law and the GFP clause are used together to support the Board's decision.

TABLE 4.1
A SUMMARY OF GFP-SUSTAINED APPEALS AND CONTRACT
CHARACTERISTICS--CY 1986-1989

| <u>Case Number</u> | <u>GFP</u> | <u>Award Date</u> | <u>COFD Date</u> | <u>Board Decision Date</u> | <u>Dispute Duration</u> |
|--------------------|-----------------------|-------------------|------------------|----------------------------|-------------------------|
| 1 | Engines | 8/76 | 7/80 | 3/86 | 68 |
| 2 | Paneling | 9/83 | 5/85 | 5/87 | 24 |
| 3 | Communication Equip | 7/77 | 10/80 | 6/87 | 68 |
| 4 | Coal | 10/80 | 12/82 | 12/87 | 60 |
| 5 | Link Plates and Bolts | 9/86 | 7/88 | 2/89 | 7 |
| 6 | Food Service Equip | 9/83 | 11/84 | 4/89 | 53 |
| 7 | Not Avail | 9/80 | 7/84 | 5/86 | 22 |
| 8 | Bearings | 5/80 | 1/84 | 2/87 | 37 |
| 9 | Food Service Equip | 7/83 | 10/86 | 6/87 | 8 |
| 10 | Restaurant Equip | 9/87 | 7/88 | 5/89 | 10 |
| 11 | Aircraft Engines | 12/70 | 4/77 | 11/89 | 151 |

Note: Date format is month/year and the dispute duration is in months.

Source: Researcher's Summary of Selected ASBCA Cases

TABLE 4.2

A COMPARISON OF THE FIVE REASONS THE BOARD SUSTAINED
THE GFP-RELATED APPEAL--CY 1986-1989

| <u>Board's Reason for Sustaining the Appeal</u> | <u>GFP Clause</u> | <u>Case Law</u> | <u>Other</u> | <u>Percentage</u> |
|---|-------------------|-----------------|--------------|-------------------|
| GFP not Suitable for its Intended Use | 1,3,4,5,6 | 1,3,5,6 | 2,4 | 54.5 |
| Government Failure to Deliver GFP | 8 | 7,8 | 7 | 18.2 |
| Government Failure to Compensate for Additional Costs Associated with Additional Items of GFP | | | 9 | 9.1 |
| Equipment Should Have Been GFE Vice CFE | | | 10 | 9.1 |
| Government Failure to Maintain Accurate Records of What it Furnished as GFP | | 11 | | 9.1 |
| Totals | 6 | 7 | 5 | 100.0 |

Note: The percentages in the right column are based on the Board's reasoning for sustaining the appeal. The basis for the Board's reasoning is divided into three columns and in some cases the Board's reasoning may involve more than one basis. The percentages to the right only count each case once, but the totals at the bottom count each basis.

Source: Researcher's Summary of Selected ASBCA Cases

V. CONCLUSIONS AND RECOMMENDATIONS

A. PREFACE

This chapter presents the conclusions followed by the recommendations that have been drawn from the analysis in Chapter IV. The conclusions are based on the problem areas identified in Chapters III and IV as the reasons the Board sustained the 11 appeals which are the subject of this research. The recommendations are potential solutions to those problem areas identified. The last section provides answers to the primary research question and subsidiary research questions to improve the effectiveness of decisions made by contracting officers in regard to the management of GFP.

B. CONCLUSIONS

1. Conclusion 1

The Government's failure to meet its requirements under the GFP clause is the Board's primary reason for sustaining the contractor's appeal. The Government's failure to provide GFP suitable for its intended use and the Government's failure to deliver GFP represented 72.7% of the Board's reasons for sustaining the appeals in this study.

2. Conclusion 2

On the procuring end of the contracting process, the contracting officer failed to formulate a contract or solicitation that protects the Government's interests and details critical information concerning GFP. This is illustrated by resulting problems in cases 2, 4, 6, 9 and 10. In these cases, either the contract or the solicitation failed to convey precisely what the Government intended. This failure led to disputes with the contractor which caused the contractor to appeal the contracting officer's final decision to the ASBCA.

3. Conclusion 3

Closely related to Conclusion 2, but on the contract administration end of the contracting process, the ACO is failing to properly interpret the contract or solicitation in making his final decision. This is illustrated by the resulting problems in cases 2, 9 and 10. In these cases, the contracting officer's interpretation of the contract or solicitation resulted in appeals of the COFD where the Board determined that the contracting officer's interpretation was incorrect.

4. Conclusion 4

In many cases, the contracting officer's final decision is based on inadequate or inaccurate information. This is illustrated by the basis of the COFD in cases 1, 2, 8 and

11. In these cases, the COFD was based on either insufficient investigation of the facts or inaccurate records.

5. Conclusion 5

In making his final decision the contracting officer is not considering the effects of the Government's failure to meet its contractual obligations if the contractor decides to appeal his decision. Although it is beyond the scope of this research, it is probable that a considerable amount could be saved in legal costs if the contracting officer negotiated an equitable adjustment with the contractor when the Government is at fault. Based on the facts presented in cases 1, 3, 4, 5, 6 and 7, it appears that the Government would have saved legal costs by negotiating an equitable adjustment. In these cases, the contracting officer was clearly aware that a problem existed with the GFP where the Government was at fault.

C. RECOMMENDATIONS

1. Recommendation 1

The contracting officer should conduct more thorough investigations of the facts causing a problem and take additional steps to remedy Government-caused problems prior to making a COFD that is unfavorable to the contractor. For example, if the GFP is unsuitable for its intended use, the contracting officer should gather all the facts, accept the Government's responsibilities and negotiate an equitable

adjustment or replace the GFP prior to making his final decision.

2. Recommendation 2

Training should be conducted at all levels of the contract administration process to ensure that individuals know what their responsibilities are concerning the management of GFP. This training would enable Government personnel to ensure that the contracting officer receives adequate and correct information to form his decision when there is a problem concerning GFP.

3. Recommendation 3

Contracting officers should be versed in the Government's responsibilities concerning GFP when formulating contracts and solicitations. By properly forming the contract, many of the contract administration problems could be avoided.

4. Recommendation 4

When there is a difference in the contracting officer's interpretation of a contract and the contractor's interpretation, the contracting officer should seek legal advice, in writing, prior to making his decision. The contracting officer should also advise the contractor of his rationale and try to negotiate a resolution prior to going through the appeal process.

5. Recommendation 5

When a dispute arises and the contracting officer knows that the Government is responsible for a portion of the problem, he should try to negotiate a solution with the contractor. If a solution can be obtained that would be less costly than going through the appeal process where the Government has a high probability of losing, the contracting officer should accept it. The contracting officer should consult legal counsel when this situation occurs if there is a question as to what the probability is that he could win his case if appealed by the contractor.

D. RESEARCH QUESTIONS

1. Primary Research Question

- What implications can be drawn from ASBCA decisions to improve the management of Government property in the possession of a contractor?

The implications from ASBCA decisions affect the management of GFP from the point a solicitation is issued and a contract awarded to the end of contract performance. The cases in this study have illustrated that when GFP is involved it is important to consider the Government's responsibilities, detailed in the GFP clause, at the beginning of the contracting process.

At the beginning of the contracting process the contracting officer must ensure that the solicitation and contract state precisely what the Government intends. During

contract performance the Government must monitor the contractor's records of GFP to ensure that the records accurately reflect what Government property has been provided to the contractor. Furthermore, if a problem arises regarding the GFP during contract performance, the contracting officer should take steps to remedy the problem or negotiate an equitable adjustment as quickly as possible.

As stated in the recommendations, training needs to be conducted at all levels. In many cases Government personnel are either not aware of their responsibilities or are failing to fulfill them. The training needs to include contracting officers to ensure that they understand the implications of their decisions when there are problems with GFP.

2. Subsidiary Research Questions

- What are the principal areas of disputes relative to Government furnished property?

The disputes can be categorized in five principal areas based on the Board's reason for sustaining the contractor's appeal. The five categories, in descending order, are:

- GFP not suitable for its intended use.
- Government failure to deliver GFP to the contractor.
- Government failure to compensate the contractor for additional costs associated with additional items of GFP.
- Equipment should have been GFE vice CFE.
- Government failure to maintain accurate records of what it furnished to the contractor as GFP.

The first category, GFP not suitable for its intended use, represented over half of the decisions to sustain the contractor's appeal. As shown in Table 4.2, the frequencies of occurrences of each category are 54.5%, 18.2%, 9.1%, 9.1% and 9.1%, respectively.

- What are the key characteristics of disputes arising from contractor management and use of Government furnished property?

The key characteristic of disputes arising from contractor management and use of GFP is the Government's failure to comply with the requirements of the GFP clause. As shown in Table 4.2, in 72.7% of the cases the Government failed to comply with the requirements of the GFP clause. Other characteristics of the disputes related to the contract not being properly written or interpreted by the contracting officer. A final characteristic found in some cases was that the contracting officer relied on inaccurate information in making his final decision regarding the contractor's claim.

- What are the essential differences between ASBCA decisions and the Federal Acquisition Regulation and how do these differences arise?

This research did not uncover any cases where the ASBCA decisions were contradictory to the Federal Acquisition Regulation. There were cases where the ASBCA did not use the requirements of the GFP clause in making its decision. In these cases, the decision was based on case law, an interpretation of the contract or solicitation, or a review of evidence presented during the appeal.

- How might these differences be resolved?

When a problem occurs with GFP that is not covered under the GFP clause, the contracting officer should conduct a thorough investigation, gathering all the facts and make his decision. If the contracting officer's interpretation of the contract differs significantly from the contractor's interpretation, he should seek legal advice.

- What are principal areas that the Government is at risk from not considering ASBCA decisions or the Federal Acquisition Regulation relative to Government furnished property?

As shown by the results of these 11 cases, the Government is at considerable risk when the contracting officer does not take into account ASBCA decisions or the Federal Acquisition Regulation relative to GFP. If the contract or solicitation is not properly formulated in the beginning, taking into account GFP requirements, the Government can be held responsible for damages suffered by the contractor. The Government is also at risk because when the problems occur, the scheduled delivery date is usually extended. Lastly, when the Government fails to consider the implications of not complying with the requirements of the GFP clause, an appeal can be tied up in the appeals process for a long period of time. During this time the Government may not be receiving the items it contracted for and the legal costs are accumulating.

E. SUMMARY

The conclusions and recommendations presented here are not new ideas, but the fact that the problems still exist and the underlying causes of the problems is significant. These problems have existed for a long time and contracting officers need to be aware of these problems and their causes in making effective decisions regarding the management of GFP.

APPENDIX A

GOVERNMENT PROPERTY CLAUSES

A. GFP COMPETITIVE FIXED-PRICE CONTRACT: (1 JULY 1985)

As prescribed in 45.106(b)(1), insert the following clause:

(a) Government furnished property. (1) The Government shall deliver to the contractor, for use in connection with and under the terms of this contract, the Government furnished property described in the Schedule or specifications together with any related data and information that the contractor may request and is reasonably required for the intended use of the property (hereinafter referred to as "Government furnished property").

(2) The delivery or performance dates for this contract are based upon the expectation that Government furnished property suitable for use (except for property furnished "as is") will be delivered to the contractor at the times stated in the schedule or, if not so stated, in sufficient time to enable the contractor to meet the contract's delivery or performance dates.

(3) If Government furnished property is received by the contractor in a condition not suitable for the intended use, the contractor shall, upon receipt of it, notify the contracting officer, detailing the facts, and, as directed by

the contracting officer and at Government expense, either repair, modify, return, or otherwise dispose of the property. After completing the directed action and upon written request of the contractor, the contracting officer shall make an equitable adjustment as provided in paragraph (h) of this clause.

(4) If Government furnished property is not delivered to the contractor by the required time, the contracting officer shall, upon the contractor's timely written request, make a determination of the delay, if any, caused the contractor and shall make an equitable adjustment in accordance with paragraph (h) of this clause.

(b) Changes in Government furnished property. (1) The contracting officer may, by written notice, (i) decrease the Government furnished property provided or to be provided under this contract, or (ii) substitute other Government furnished property to be provided by the Government, or to be acquired by the contractor for the Government, under this contract. The contractor shall promptly take such action as the contracting officer may direct regarding the removal, shipment, or disposal of the property covered by such notice.

(2) Upon the contractor's written request, the contracting officer shall make an equitable adjustment to the contract in accordance with paragraph (h) of this clause, if the Government has agreed in the Schedule to make the property available for performing this contract and there is any-

(i) Decrease or substitution in this property pursuant to subparagraph (b)(1) above: or

(ii) Withdrawal of authority to use this property, if provided under any other contract or lease.

(c) Title in Government property. (1) The Government shall retain title to all Government furnished property.

(2) All Government furnished property and all property acquired by the contractor, title to which vests in the Government under this paragraph (collectively referred to as "Government property"), are subject to the provisions of this clause. Title to Government property shall not be affected by its incorporation into or attachment to any property not owned by the Government, nor shall Government property become a fixture or lose its identity as personal property by being attached to any real property.

(3) Title to each item of facilities, special test equipment, and special tooling (other than that subject to a special tooling clause) acquired by the contractor for the Government under this contract shall pass to and vest in the Government when its use in performing this contract commences or when the Government has paid for it, whichever is earlier, whether or not title previously vested in the Government.

(4) If this contract contains a provision directing the contractor to purchase material for which the Government

will reimburse the contractor as a direct item of cost under this contract-

(i) Title to material purchased from a vendor shall pass to and vest in the Government upon the vendor's delivery of such materials; and

(ii) Title to all other material shall pass to and vest in the Government upon-

(A) Issuance of the material for use in contract performance;

(B) Commencement of processing of the material or its use in contract performance; or

(C) Reimbursement of the cost of the material by the Government, whichever occurs first.

(d) Use of Government property. The Government property shall be used only for performing this contract, unless otherwise provided in this contract or approved by the contracting officer.

(e) Property administration. (1) The contractor shall be responsible and accountable for all Government property provided under this contract and shall comply with FAR Subpart 45.5 as in effect on the date of this contract.

(2) The contractor shall establish and maintain a program for the use, maintenance, repair, protection and preservation of Government property in accordance with sound industrial practice and the applicable provisions of subpart 45.5 of the FAR.

(3) If damage occurs to Government property, the risk of which has been assumed by the Government under this contract, the Government shall replace the items or the contractor shall make such repairs as the Government directs. However, if the contractor cannot effect such repairs within the time required, the contractor shall dispose of the property as directed by the contracting officer. When any property for which the Government is responsible is replaced or repaired, the contracting officer shall make an equitable adjustment in accordance with paragraph (h) of this clause.

(4) The contractor represents that the contract price does not include any amount for repairs or replacement for which the Government is responsible. Repair or replacement of property for which the contractor is responsible shall be accomplished by the contractor at its own expense.

(f) Access. The Government and all its designees shall have access at all reasonable times to the premises in which any Government property is located for the purpose of inspecting the Government property.

(g) Risk of loss. Unless otherwise provided in this contract, the contractor assumes the risk of, and shall be responsible for, any loss or destruction of, or damage to, Government property upon its delivery to the contractor or upon passage of title to the Government under paragraph (c) of this clause. However, the contractor is not responsible for reasonable wear and tear to Government property or for

Government property properly consumed in performing this contract.

(h) Equitable adjustment. When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes clause. When appropriate, the contracting officer may initiate an equitable adjustment in favor of the Government. The right to an equitable adjustment shall be the contractor's exclusive remedy. The Government shall not be liable to suit for breach of contract for-

(1) Any delay in delivery of Government furnished property;

(2) Delivery of Government furnished property in a condition not suitable for its intended use;

(3) A decrease in or substitution of Government furnished property; or

(4) Failure to repair or replace Government property for which the Government is responsible.

(i) Final accounting and disposition of Government furnished property. Upon completion of the contract, or at such earlier dates as may be fixed by the contracting officer, the contractor shall submit, in a form acceptable to the contracting officer, inventory schedules covering all items of Government property (including any resulting scrap) not consumed in performing this contract or delivered to the Government. The contractor shall prepare for shipment,

deliver f.o.b. origin, or dispose of the Government property as may be directed or authorized by the contracting officer. The net proceeds of any such disposal shall be paid to the Government as the contracting officer directs.

(j) Abandonment and restoration of contractor's premises.

Unless otherwise provided herein, the Government-

(1) May abandon any Government property in place, at which time all obligations of the Government regarding such abandoned property shall cease; and

(2) Has no obligation to restore or rehabilitate the contractor's premises under any circumstances (e.g., abandonment, disposition upon completion of need, or upon contract completion). However, if the Government furnished property (listed in the Schedule or specifications) is withdrawn or is unsuitable for the intended use, or if the Government property is substituted, then the equitable adjustment under paragraph (h) of this clause may properly include restoration or rehabilitation costs.

(k) Communications. All communications under this clause shall be in writing.

(1) Overseas contracts. If this contract is to be performed outside of the United States of America, its territories, or possessions, the words "Government" and "Government furnished" (wherever they appear in this clause) shall be construed as "United States Government" and "United States Government furnished," respectively.

B. GFP ALTERNATE I NONCOMPETITIVE FIXED-PRICE CONTRACT:
(1 JULY 1985)

As prescribed in 45,106(b)(2), substitute the following paragraph (g) for paragraph (g) of the basic clause:

(g) Limited risk of loss. (1) The term "contractor's managerial personnel," as used in this paragraph (g), means the contractor's directors, officers, and any of the contractor's managers, superintendents, or equivalent representatives who have supervision or direction of-

(i) All or substantially all of the contractor's business;

(ii) All or substantially all of the contractor's operation at any one plant or separate location at which the contract is being performed; or

(iii) A separate and complete major industrial operation connected with performing this contract.

(2) The contractor shall not be liable for loss or destruction of, or damage to, the Government property provided under this contract (or, if an educational or nonprofit organization, for expenses incidental to such loss, destruction, or damage), except as provided in subparagraphs (3) and (4) below.

(3) The contractor shall be responsible for loss or destruction of, or damage to, the Government property provided under this contract (including expenses incidental to such loss, destruction, or damage)-

(i) That results from a risk expressly required to be insured under this contract, but only to the extent of the insurance required to be purchased and maintained, or to the extent of insurance actually purchased and maintained, whichever is greater;

(ii) That results from a risk that is in fact covered by insurance or for which the contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;

(iii) For which the contractor is otherwise responsible under the express terms of this contract;

(iv) That results from willful misconduct or lack of good faith on the part of the contractor's managerial personnel; or

(v) That results from a failure on the part of the contractor, due to willful misconduct or lack of good faith on the part of the contractor's managerial personnel, to establish and administer a program or system for the control, use, protection, preservation, maintenance, and repair of Government property as required by paragraph (e) of this clause.

(4) (i) If the contractor fails to act as provided in subdivision (g)(3)(v) above, after being notified (by certified mail addressed to one of the contractor's managerial personnel) of the Government's disapproval, withdrawal of

approval, or nonacceptance of the system or program, it shall be conclusively presumed that such failure was due to willful misconduct or lack of good faith on the part of the contractor's managerial personnel.

- (ii) In such event, any loss or destruction of, or damage to, the Government property shall be presumed to have resulted from such failure unless the contractor can establish by clear and convincing evidence that such loss, destruction, or damage-
- (A) Did not result from the contractor's failure to maintain an approved program or system; or
- (B) Occurred while an approved program or system was maintained by the contractor.

(5) If the contractor transfers Government property to the possession of a subcontractor, the transfer shall not affect the liability of the contractor for loss or destruction of, or damage to, the property as set forth above. However, the contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of, or damage to, the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the contracting officer, relieves the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for

reasonable wear and tear or for its use in accordance with the provisions of the prime contract.

(6) Upon loss or destruction of, or damage to, Government property provided under this contract, the contractor shall so notify the contracting officer and shall communicate with the loss and salvage organization, if any, designated by the contracting officer. With the assistance of any such organization, the contractor shall take all reasonable action to protect the property from further damage, separate the damaged and undamaged Government property, put all the affected Government property in the best possible order, and furnish to the contracting officer a statement of-

(i) The lost, destroyed, or damaged Government property;

(ii) The time and origin of the loss, destruction, or damage;

(iii) All known interests commingled property of which the Government property is a part; and

(iv) The insurance, if any, covering any part of or interest in such commingled property.

(7) The contractor shall repair, renovate, and take other such action with respect to damaged Government property as the contracting officer directs. If the Government property is destroyed or damaged beyond practical repair, or is damaged and so commingled or combined with property of others (including the contractor's) that separation is

impractical, the contractor may, with the approval of and subject to any conditions imposed by the contracting officer, sell such property for the account of the Government. Such sales may be made in order to minimize the loss to the Government, to permit the resumption of business, or to accomplish a similar purpose. The contractor shall be entitled to an equitable adjustment in the contract price for the expenditures made in performing the obligations under this subparagraph (g)(7) in accordance with paragraph (h) of this clause. However, the Government may directly reimburse the loss and salvage organization for any of their charges. The contracting officer shall give due regard to the contractor's liability under this paragraph (g) when making any such equitable adjustment.

(8) The contractor represents that it is not included in the price and agrees it will not hereafter include in any price to the Government any charge or reserve for insurance (including any self-insurance fund or reserve) covering loss or destruction of, or damage to, Government property, except to the extent that the Government may have expressly required the contractor to carry such insurance under another provision of this contract.

(9) In the event the contractor is reimbursed or otherwise compensated for any loss or destruction of, or damage to, Government property, the contractor shall use the proceeds to repair, renovate, or replace the lost, destroyed,

or damaged Government property or shall otherwise credit the proceeds to or equitably reimburse the Government, as directed by the contracting officer.

(10) The contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss or destruction of, or damage to, Government property. Upon the request of the contracting officer, the contractor shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of, or damage to, Government property, the contractor shall enforce for the benefit of the Government the liability of the subcontractor for such loss, destruction, or damage.

C. GFP COST-REIMBURSEMENT CONTRACT: (20 JANUARY 1986)

As prescribed in 45.106(f)(1), insert the following clause:

(a) Government furnished property. (1) The term "contractor's managerial personnel." as used in paragraph (g) of this clause, means any of the contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of-

(i) All or substantially all of the contractor's business;

(ii) All or substantially all of the contractor's operation at any one plant, or separate location at which the contract is being performed; or

(iii) A separate and complete major industrial operation connected with performing this contract.

(2) The Government shall deliver to the contractor, for use in connection with and under the terms of this contract, the Government furnished property described in the Schedule or specifications, together with such related data and information as the contractor may request and as may be reasonably required for the intended use of the property (hereinafter referred to as "Government furnished property").

(3) The delivery or performance dates for this contract are based upon the expectation that Government furnished property suitable for use will be delivered to the contractor at the times stated in the Schedule or, if not so stated, in sufficient time to enable the contractor to meet the contract's delivery or performance dates.

(4) If Government furnished property is received by the contractor in a condition not suitable for the intended use, the contractor shall, upon receipt, notify the contracting officer, detailing the facts, and, as directed by the contracting officer and at Government expense, either effect repairs or modification or return or otherwise dispose

of the property. After completing the directed action and upon written request of the contractor, the contracting officer shall make an equitable adjustment as provided in paragraph (h) of this clause.

(5) If Government furnished property is not delivered to the contractor by the required time or times, the contracting officer shall, upon the contractor's timely written request, make an equitable adjustment in accordance with paragraph (h) of this clause.

(b) Changes in Government furnished property. (1) The contracting officer may, by written notice, (i) decrease the Government furnished property provided or to be provided under this contract or (ii) substitute other Government furnished property for the property to be provided by the Government or to be acquired by the contractor for the Government under this contract. The contractor shall promptly take such action as the contracting officer may direct regarding the removal, shipment, or disposal of the property covered by this notice.

(2) Upon the contractor's written request, the contracting officer shall make an equitable adjustment to the contract in accordance with paragraph (h) of this clause, if the Government has agreed in the Schedule to make such property available for performing this contract and there is any-

(i) Decrease or substitution in this property pursuant to subparagraph (b)(1) above; or

(ii) Withdrawal of authority to use property,
if provided under any other contract or lease.

(c) Title. (1) The Government shall retain title to all
Government furnished property.

(2) Title to all property purchased by the contractor
for which the contractor is entitled to be reimbursed as
a direct item of cost under this contract shall pass to and
vest in the Government upon the vendor's delivery of such
property.

(3) Title to all other property, the cost of which
is reimbursable to the contractor, shall pass to vest in the
Government upon-

(i) Issuance of the property for use in
contract performance;

(ii) Commencement of processing of the property
or use in contract performance; or

(iii) Reimbursement of the cost of the property
by the Government, whichever occurs first.

(4) All Government furnished property and all
property acquired by the contractor, title to which vests in
the Government under this paragraph (collectively referred to
as "Government property"), are subject to the provisions of
this clause. Title to Government property shall not be
affected by its incorporation into or attachment to any
property not owned by the Government, nor shall Government

property become a fixture or lose its identity as personal property by being attached to any real property.

(d) Use of Government property. The Government property shall be used only for performing this contract, unless otherwise provided in this contract or approved by the contracting officer.

(e) Property administration. (1) The contractor shall be responsible and accountable for all Government property provided under the contract and shall comply with FAR Subpart 45.5, as in effect on the date of this contract.

(2) The contractor shall establish and maintain a program for the use, maintenance, repair, protection, and preservation of Government property in accordance with sound business practice and the applicable provisions of FAR Subpart 45.5.

(3) If damage occurs to Government property, the risk of which has been assumed by the Government under this contract, the Government shall replace the items or the contractor shall make such repairs as the Government directs. However, if the contractor cannot effect such repairs within the time required, the contractor shall dispose of the property as directed by the contracting officer. When any property for which the Government is responsible is replaced or repaired, the contracting officer shall make an equitable adjustment in accordance with paragraph (h) of this clause.

(f) Access. The Government and all its designees shall have access at all reasonable times to the premises in which any Government property is located for the purpose of inspecting the Government property.

(g) Limited risk of loss. (1) The contractor shall not be liable for loss or destruction of, or damage to, the Government property provided under this contract or for expenses incidental to such loss, destruction, or damage, except as provided in subparagraphs (2) and (3) below.

(2) The contractor shall be responsible for loss or destruction of, or damage to, the Government property provided under this contract (including expenses incidental to such loss, destruction, or damage)-

(i) That results from a risk expressly required to be insured under this contract, but only to the extent of the insurance required to be purchased and maintained or to the extent of insurance actually purchased and maintained, whichever is greater;

(ii) That results from a risk that is in fact covered by insurance or for which the contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;

(iii) For which the contractor is otherwise responsible under the express terms of this contract;

(iv) That results from willful misconduct or lack of good faith on the part of the contractor's managerial personnel; or

(v) That results from a failure on the part of the contractor, due to willful misconduct or lack of good faith on the part of the contractor's managerial personnel, to establish and administer a program or system for the control, use, protection, preservation, maintenance, and repair of Government property as required by paragraph (e) of this clause.

(3) (i) If the contractor fails to act as provided by subdivision (g)(2)(v) above, after being notified (by certified mail addressed to one of the contractor's managerial personnel) of the Government's disapproval, withdrawal of approval, or nonacceptance of the system or program, it shall be conclusively presumed that such failure was due to willful misconduct or lack of good faith on the part of the contractor's managerial personnel.

(ii) In such event, any loss or destruction of, or damage to, the Government property shall be presumed to have resulted from such failure unless the contractor can establish by clear and convincing evidence that such loss, destruction, or damage-

(A) Did not result from the contractor's failure to maintain an approved program or system; or

(B) Occurred while an approved program or system was maintained by the contractor.

(4) If the contractor transfers Government property to the possession and control of a subcontractor, the transfer shall not affect the liability of the contractor for loss or destruction of, or damage to, the property as set forth above. However, the contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of, or damage to, the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the contracting officer, relieves the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for reasonable wear and tear or for its use in accordance with the provisions of the prime contract.

(5) Upon loss or destruction of, or damage to, Government property provided under this contract, the contractor shall so notify the contracting officer and shall communicate with the loss and salvage organization, if any, designated by the contracting officer. With the assistance of any such organization, the contractor shall take all reasonable action to protect the property from further damage, separate the damaged and undamaged Government property, put

loss and salvage organization for any of their charges. The contracting officer shall give due regard to the contractor's liability under this paragraph (g) when making any such equitable adjustment.

(7) The contractor shall not be reimbursed for, and shall not include as an item of overhead, the cost of insurance or of any reserve covering risk of loss or destruction of, or damage to, Government property, except to the extent that the Government may have expressly required the contractor to carry such insurance under another provision of this contract.

(8) In the event the contractor is reimbursed or otherwise compensated for any loss or destruction of, or damage to, Government property, the contractor shall use the proceeds to repair, renovate, or replace the lost, destroyed, or damaged Government property or shall otherwise credit the proceeds to or equitably reimburse the Government, as directed by the contracting officer.

(9) The contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss or destruction of, or damage to, Government property. Upon the request of the contracting officer, the contractor shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery.

In addition, where a subcontractor has not been relieved from liability for any loss or destruction of, or damage to, Government property, the contractor shall enforce for the benefit of the Government the liability of the subcontractor for such loss, destruction, or damage.

(h) Equitable adjustment. When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes clause. When appropriate, the contracting officer may initiate an equitable adjustment in favor of the Government. The right to an equitable adjustment shall be the contractor's exclusive remedy. The Government shall not be liable to suit for breach of contract for-

(1) Any delay in delivery of Government furnished property;

(2) Delivery of Government furnished property in a condition not suitable for its intended use;

(3) A decrease in or substitution of Government furnished property; or

(4) Failure to repair or replace Government property for which the Government is responsible.

(i) Final accounting and disposition of Government furnished property. Upon completion of the contract, or at such earlier dates as may be fixed by the contracting officer, the contractor shall submit, in a form acceptable to the contracting officer, inventory schedules covering all items of

Government property not consumed in performing this contract or delivered to the Government. The contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of the Government property as may be directed or authorized by the contracting officer. The net proceeds of any such disposal shall be credited to the cost of the work covered by this contract or paid to the Government as directed by the contracting officer. The foregoing provisions shall apply to scrap from Government property; provided, however, that the contracting officer may authorize or direct the contractor to omit from such inventory schedules any scrap consisting of faulty castings or forgings or of cutting and processing waste, such as chips, cuttings, borings, turnings, short ends, circles, trimmings, clippings, and remnants, and to dispose of such scrap in accordance with the contractor's normal practice and account for it as a part of general overhead or other reimbursable costs in accordance with the contractor's established accounting procedures.

(j) Abandonment and restoration of contractor's premises.

Unless otherwise provided herein, the Government-

(1) May abandon any Government property in place, at which time all obligations of the Government regarding such abandoned property shall cease; and

(2) Has no obligation to restore or rehabilitate the contractor's premises under any circumstances (e.g., abandonment, disposition upon completion of need, or upon contract

completion). However, if the Government furnished property (listed in the Schedule or specifications) is withdrawn or is unsuitable for the intended use, or if the Government property is substituted, then the equitable adjustment under paragraph (h) of this clause may properly include restoration or rehabilitation costs.

(k) Communications. All communications under this clause shall be in writing.

(l) Overseas contracts. If this contract is to be performed outside of the United States of America, its territories, or possessions, the words "Government" and "Government furnished" (wherever they appear in this clause) shall be construed as "United States Government" and "United States Government," respectively.

Source: Federal Acquisition Regulation, Part 52.245-2 and 52.245-5.

APPENDIX B

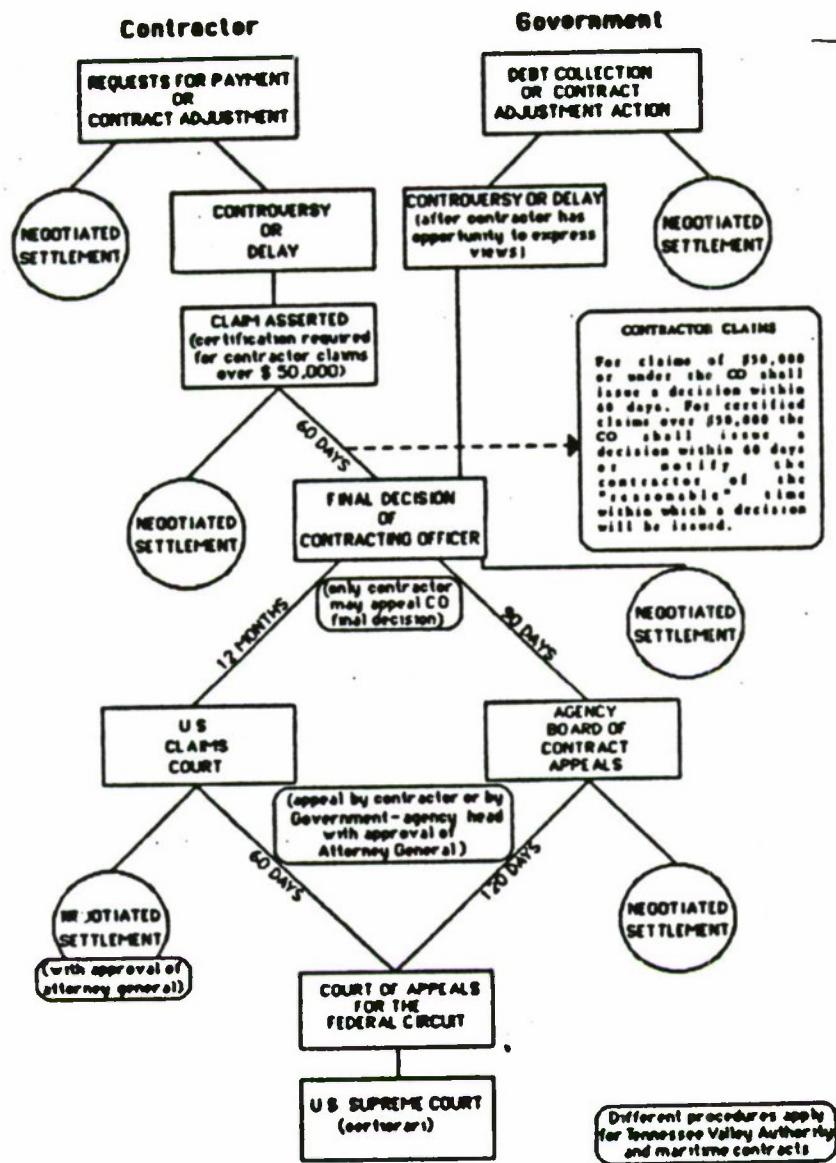
CONTRACT DISPUTES ACT OF 1978 COVERAGE

| | MANDATORY COVERAGE | COVERAGE EXCLUDED OR OPTIONAL |
|-------------------------|---|--|
| Date of contract | Contracts entered into after March 1, 1979 | Contracts entered into prior to March 1, 1979 excluded unless contractor elects coverage on final decisions issued after March 1, 1979. |
| Government Organization | Executive agencies and exchange services | Nonappropriated fund activities other than exchange services and TVA contracts. |
| Nature of Transaction | Procurement of property, services, construction, alteration, repair, or maintenance of real property, and leases of real property, maritime contracts involving procurement of property or services | Procurement of real property in being, contracts with foreign governments or agencies. |
| Type of Agreement | Express or implied in fact contracts | Implied in law contracts and implied contracts to consider bids or proposals fairly. |
| Type of Claim | Arising under or relating to a contract | Restitution (quasi-contract) not related to contract, claims involving fraud, claims involving statutory penalties or forfeitures under specific jurisdiction of another federal agency. |

| MANDATORY COVERAGE | COVERAGE EXCLUDED OR OPTIONAL |
|--------------------|---|
| Nature of Relief | Money in a sum certain, adjustment or interpretation of contract terms, or other relief |

Source: Cibinic, J. Jr., and Nash, R.C., Jr.,
Administration of Government Contracts,
George Washington University, 1985

APPENDIX C
DISPUTES PROCESS



Source: Cibinic, J. Jr., and Nash, R.C., Jr.,
Administration of Government Contracts,
George Washington University, 1985

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11. 89-2 BCA 21,693, Structural Systems Technology, Inc., ASBCA No. 36,950, 13 February 1989, Contract No. F25600-86-C-0076.
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13. 86-3 BCA 19,042, Essex Electro Engineers, Inc., ASBCA No. 30,119, 13 May 1986, Contract No. N00123-80-C-0588.
14. 87-2 BCA 19,763, H.N. Bailey and Associates, ASBCA No. 29,298, 4 February 1987, Contract No. F34601-80-C-2412.
15. 87-2 BCA 19,904, JBS Missouri, Inc., ASBCA No. 34,044, 4 June 1987, Contract No. F17600-83-C-0024.
16. 89-3 BCA 22,015, Firco, Inc., ASBCA No. 37,829, 5 May 1989, Contract No. DAAB08-87-C-R368.
17. 90-1 BCA 22,492, Gary Aircraft Corporation, ASBCA No. 22,018, 17 November 1989, Contract No. F41608-71-D-0289.

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